DANIEL KC TAN & ASSOCIATES SDN BHD *a*

v.

PROGRESSIVE INSURANCE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR *b*
RK NATHAN J
[SUIT NO: P22-34-1986]
14 MARCH 2001

INSURANCE: *Formation of contract - Agreement between principal agent and insurance company - Breach - Defendant's failure to give required three months' notice of intention to terminate - Whether applicable since plaintiff failed to remit premiums - Whether plaintiff proved defendant in breach* *c*

INSURANCE: *Formation of contract - Arbitration clause - Failure to resort to arbitration - Evidence showed plaintiff had opposed application at interlocutory stage - Whether plaintiff bound by issue estoppel - Whether plaintiff could re-agitate issue at full hearing - Whether plaintiff could approbate and reprobate* *d*

TORT: *Damages - Defamation - Notices sent out by defendant to plaintiff's customers and policy holders - Whether defamatory - Whether defendant was within its rights to do so - Whether defendant under a legal and social duty* *e*

The plaintiff in this case was appointed the defendant's principal agent by a principal agency agreement ("the agreement") between the plaintiff and the defendant, a licensed insurance company. The plaintiff was authorised to underwrite or transact insurance business or policies. Pursuant to cl. 7 of the agreement, the plaintiff is to pay to the defendant within 90 days all monies due to the defendant in the form of premiums collected by the plaintiff, and cl. 14 states that either party must give the other three months' notice of intention to terminate the agreement. *f*

It was the plaintiff's case that in breach of cl. 14, the defendant had sent out notices dated 10 November 1986 to the plaintiff's customers or various policy holders stating that the agreement with the plaintiff had been terminated as of 30 September 1986. The plaintiff claimed that no such notice of termination was ever given or served on it. The plaintiff contended that it had been defamed and thus sued for damages for breach of contract, including damages for defamation *g* *h*

i

The defendant contended that the termination of the agreement was because the plaintiff had not remitted to the defendant the premiums collected, hence breaching cl. 7. The defendant also denied that its notice to the various policy holders was defamatory, and contended that it was sent in good faith, without malice and that it was fair comment on a matter of public interest. The defendant thus asked for the suit to be dismissed with costs.

Held:

[1] The failure of the plaintiff to transmit the collected premium within the stipulated 90 days pursuant to cl. 7 would in itself entitle the defendant to terminate the agreement forthwith. Hence, the required three months' notice to be given by the defendant in its intention to terminate the agreement pursuant to cl. 14 was inapplicable. The plaintiff had failed to prove that the defendant had been in breach of contract.

[2] The plaintiff also pleaded that the defendant had breached cl. 21 which provided for arbitration in the event of any dispute between the parties and that the defendant had failed to resort to arbitration before terminating the contract. A perusal of the file showed that the defendant had indeed filed an application for a stay of all further proceedings pending reference to arbitration, but was dismissed with costs after the plaintiff had opposed the application.

[2a] The plaintiff is bound by issue estoppel and cannot invoke this provision in the agreement. The plaintiff's contention that it can re-agitate this issue at the full hearing since the earlier application was only an interlocutory application is flawed as the issue of arbitration has indeed been decided, albeit at an interlocutory stage, yet binding upon the parties. The plaintiff had given no explanation as to why it had oppose the said application at the interlocutory stage if its intention was to go for arbitration. Surely the plaintiff could not approbate and reprobate.

[3] There was nothing defamatory about the contents of the notice of termination of the plaintiff's agency that was sent out to all the plaintiff's customers and policy holders. The defendant was certainly within its rights to enquire from the customers proof of payment because the defendant was not expected to carry the burden of insurance without receiving the premiums. The plaintiff knew well that it had not complied with the 90 day rule to settle the premiums. If the plaintiff felt humiliated or defamed, the plaintiff was the author of its own misfortune.

[4] The defendant was under a legal and social duty to publish the said notices for the necessary protection of the general public and in particular the policy holders and also in the defendant's own interest. As the defendant was a licensed insurance company, the defendant was entitled by law to send out such notices to all its policy holders.

[Plaintiff's claim dismissed with costs.]

Case(s) referred to:

Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor [1993] 2 CLJ 495 ***(refd)***

Dato' Seri Anwar lbrahim v. Dato' Seri Dr Mahathir Mohamad [1999] 7 CLJ 32 ***(refd)***

Dato' Seri Anwar Ibrahim v. Dato' Seri Dr. Mahathir Mohamad [2001] 1 CLJ 519 ***(refd)***

Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad (Mahkamah Persekutuan Malaysia Permohonan Sivil No. 08-2-2001(W)) ***(refd)***

Howe v. Botwood [1913] 3 KB 387 ***(refd)***

Ratus Mesra Sdn Bhd v. Shaikh Osman Majid [1999] 8 CLJ 499 ***(refd)***

The Capital and Counties Bank Ltd v. George Henry and Sons [1882] 7 AC 741 ***(refd)***

Legislation referred to:

Insurance (Assumption of Risk and Collection of Premium) Regulations 1980, reg 3
Insurance Act 1996, s. 14A, 4(1)

For the plaintiff - Wong Kam Leong (CC Cheng & Angela Low with him); M/s Wong Kam Leong & Partners

For the defendant - Muralee Menon (Allen Miranda with him); M/s Jaffar & Menon

Reported by Suhainah Wahiduddin

JUDGMENT

RK Nathan J:

Facts

The defendant is a local insurer licensed under the Insurance Act 1996 ('the Act') to deal with general business which means all insurance business which is not life business (see s. 4(1) of the Act). The plaintiff was at all material times in the business of insurance underwriting. By a principal agency agreement (the agreement) dated 2 January 1981 between the plaintiff and the defendant, the plaintiff was appointed the defendant's principal agent and in pursuance thereof the plaintiff was authorised to underwrite or transact insurance business or policies and was authorised to issue policies of all kinds which included motor and non-motor policies. By virtue of the said agreement

the plaintiff did transact and/or contract and/or underwrite insurance policies with various policy holders. It is relevant, for the purposes of deciding this case to set out the relevant provisions of the said agreement which read as follows:

7. SETTLEMENT OF ACCOUNTS

Statement of Accounts shall be rendered on a monthly basis. The Company hereby agrees and convenants and the Principal Agent hereby agrees only for a period not exceeding NINETY (90) full days. All money due to the Company under any form of business transacted in the name or on behalf of the Company shall be due and paid up to the Company within the aforesaid NINETY (90) full days. No credit period is allowable for MOTOR INSURANCE except in compliance with provision made under the CASH BEFORE COVER REGULATION

14. PERIOD OF AGREEMENT/TERMINATION

The Agreement takes effect on and from 1st July, 1980 and shall remain in force until cancelled by either the Principal Agent or the Company giving to the other THREE (3) months' notice of their intention to terminate this Agreement. In the event of this Agreement being terminated as herein provided all insurance commencing prior to the expiry date of the notice of cancellation shall continue to their NATURAL EXPIRY date and the Company shall be responsible and will meet all claims arising therefrom provided premiums for such insurance has been paid to the Company.

21. ARBITRATION

All disputes and differences which may arise between the contracting parties in respect of business ceded under this Agreement or the meaning of its conditions are to be settled by an equitable rather than a strictly legal interpretation of the provisions of this Agreement. Failing agreement between the parties they shall submit it to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings. The Arbitrators will not have to undergo any judicial formality and can abstain from following the strict rules of laws, but shall construe this Agreement as a mutual understanding binding in honour in accordance with fair insurance practice. The Arbitration proceeding shall take place in Malaysia. The Arbitrators shall fix their own procedures including the apportionment and payment of costs. The award of the Arbitrators shall be final and binding on both parties.

The Plaintiff's Claim

It is the plaintiff's case that in breach of cl. 14, the defendant sent out notices dated 10 November 1986 to the plaintiff's customers or policy holders or sub-agents and stating that the said agreement with the plaintiff had been terminated as of 30 September 1986. It is also necessary to reproduce a sample of the said letter sent out by the defendant to one of the plaintiff's customers. The said notice reads as follows:

SCHEDULE

PROGRESSIVE INSURANCE SDN BHD

10 NOV. 1986

CHEE SENG MEE
69, LORONG BUKIT CINA
75100 MELAKA

A.R. REGISTER

DEAR SIR,

RE: CANCELLATION OF POLICY
POLICY NO : MMC1003574
VEHICLE REGN NO : ME 61
PREMIUM : M$40.88

WE WISH TO INFORM YOU THAT THE AGENCY OF DANIEL K.C. TAN & ASSOCIATE SDN BHD HAS BEEN TERMINATED EFFECTIVE 30TH SEPTEMBER, 1986.

WE THEREFORE REQUEST THAT YOU KINDLY SUBMIT COPIES OF ALL THE OFFICIAL RECEIPTS EVIDENCING PREMIUM PAYMENTS MADE TO DANIEL K.C. TAN & ASSOCIATE SDN BHD TO US. AS A RESULT OF THE TERMINATION OF THE SAID AGENCY WE WOULD KINDLY INSTRUCT YOU FROM NOW ON TO MAKE ALL PREMIUM PAYMENTS DIRECT TO US.

FURTHER PLEASE ALSO FORWARD TO US COPIES OF THE RECEIPTS AS ABOVE TOGETHER WITH ANY OUTSTANDING PREMIUMS DUE WITHIN FOURTEEN (14) DAYS FROM THE DATE HEREOF FAILING WHICH WE HAVE NO ALTERNATIVE BUT TO EXERCISE OUR RIGHTS IN CANCELLING YOUR POLICY.

YOURS FAITHFULLY

PROGRESSIVE INSURANCE SDN BHD

Sgd.
MOHD ZERAIN MAJID
REGIONAL MANAGER

C.C. DANIEL K.C. TAN & ASSOCIATE SDN BHD

The plaintiff contended that no such notice of termination was ever given or served on it. Claiming that it was inundated with calls and visits from its clients and customers upon receipt of the defendant's notice, the plaintiff contended that it had been defamed. It thus sued for damages for breach of contract, damages, including aggravated damages for defamation, and also sought an injunction and costs.

Case For The Defence

Whilst not expressly admitting to a specific date as to when the notice of termination was either dated or given, the defendant pleaded in its defence that it had "prior to 30 September 1986, and in accordance with the said agreement given all necessary and relevant notices to the plaintiff of the defendant's intended termination due to reasons best known to the plaintiff and of which the plaintiff has full knowledge". The defendant contended that the termination of the agreement was brought about because the plaintiff had not remitted to the defendant the premiums collected and that based on the plaintiff's auditors' documentation itself, the plaintiff had, as of 18 December 1986 owed the defendant the sum of RM1,050,100.25 as unpaid premium. The defendant also denied that its notice to the various policy holders was defamatory or that the said words in the notice bore or were understood to bear or were capable of bearing any of the meanings as set out by the plaintiff. The defendant contended that it sent out that notice in good faith and without malice and that it was fair comment on a matter of public interest, namely, to protect the interest of the policy holders who might not be covered although they might be under the misconception that they were being covered since they had paid the premiums. There was a counterclaim by the defendant, which it subsequently withdrew. Since the court was not notified by either party as to whether there was to be any order for costs, I shall refrain from making any order for costs in respect of the counterclaim.

The defendant thus asked for the suit to be dismissed with costs.

Findings Of The Court

On Contract

The main grouse of the plaintiff was the defendant's breach of cl. 14 of the said agreement in failing to give the required three months' notice of the defendant's intention to terminate the agreement. Admittedly there is no such

notice that was alleged to have been given, that has been shown to the court. There is no such notice in the two volumes of the bundles of agreed documents. Whilst the defendant had boldly pleaded that prior to 30 September 1986 and that in accordance with the said agreement, it had given "all necessary and relevant notice to the plaintiff", unfortunately this is denied by the plaintiff and in the absence of any such document the court must find that no such notice has been given. The court is at a loss to understand why an insurance company that is required by the stringent terms of the Act to regulate its operations properly, would put itself in such a precarious position as not to be able to produce its own office copy of the alleged notice. At least the defendant ought to have served the plaintiff with a notice to produce. Since the notice of termination is the linchpin of the case of the defendant, all the more was it incumbent upon the defendant to have preserved the said notice. I agree with the plaintiffs submission that it is a question of fact for this court to find if such a notice of termination had indeed been given by the defendant and it is my finding that no such notice was indeed given.

When Is Such A Notice Relevant?

The defendant argued that the requirement of the notice pursuant to cl. 14 becomes important only in cases of either party not wanting to continue with the agreement indefinitely. I agree. It is necessary for this court to consider the agreement as a whole rather than clause by clause in order to appreciate the reason why the requirement of the three months' notice was stipulated in cl. 14. The said agreement took effect from 1 July 1980 and no termination date for the said agreement had been provided for. Other than what is stated in cl. 14 there are no other reasons given as to when parties could terminate the said agreement. Therefore it only stands to logic that the need to give a three month notice by either party wanting to terminate the said agreement was to enable them to regulate their accounts and related matters. This clause therefore need not apply to an instance of a breach of cl. 7 of the agreement by the plaintiff. I am fortified in holding this view by referring to the judgment of Channell J in *Howe v. Botwood* [1913] 3 KB 387. In that case a lease of a dwelling-house contained a covenant by the lessee to "pay and discharge all rates, taxes, assessments, charges, and out-goings whatsoever which now are or during the said term shall be imposed or charged on the premises or the landlord or tenant in respect thereof (land tax and landlord's property tax only excepted)". The lessor covenanted to "keep the exterior of the said dwelling-house and buildings in repair." The sanitary authority served notice during the term on the lessor under the Public Health Act 1875, stating that a nuisance existed on the premises arising from an outside defective drain and requiring him to do certain work which involved the renewal and reconstruction of the drainage system outside the house; and an order of justices was made directing him to do the work. The lessor accordingly did

the work required, and claimed to recover from the lessee the cost thereof so far as it exceeded mere repair. The court held that the lessee's covenant to pay "all outgoings imposed on the landlord in respect of the premises" must be read as being subject to the performance by the lessor of his covenant to keep the exterior of the buildings in repair, and that, as the work of renewal and reconstruction was necessary in order to enable the lessor to perform his covenant to repair, he was bound to bear the cost thereof. The learned judge said at p. 391 as follows:

> ... The expense of executing the work would under this covenant fall on the plaintiff. If therefore that covenant by the plaintiff had stood alone without the covenant by the defendant, that is how I should construe it. That covenant, however, has to be read with the earlier covenant by the tenant to pay and discharge all outgoings. There are thus two covenants, one placing the burden on the tenant and the other placing it on the landlord. We must construe the lease as a whole so as to make it consistent in both its parts. In my opinion the covenant by the tenant must be read as if it contained the words 'except such as are by this lease imposed upon the landlord.' By reading that exception into the covenant by the tenant the two covenants can be read together. If it were not so read in, the cost of ordinary repairs to the outside drains might come within the tenant's covenant.

It is therefore my view that cl. 14 should be read as if it contained the words "except where there has been a breach of cl. 7 of this agreement".

Breach Of Cl. 7

Needless to say cl. 7 is the most important clause as between the parties. It requires on an imperative tone that the plaintiff do pay to the defendant within 90 days all monies due to the defendant in the form of premiums collected by the plaintiff. However, in respect of motor policies, this clause stipulates that there be no credit period allowable, no doubt because of the requirement of cash before cover. Clause 8 allows for the plaintiff however to deduct its commission and send the balance to the defendant within the stipulated period of 90 days for non-motor policies.

By a letter dated 22 March 1986 the defendant wrote to the plaintiff informing him that as of that date the plaintiff owed the defendant the sum of RM1,106,871 as outstanding premium made up as follows:

Motor	RM 260,327.52
Non-motor	RM 846,543.48
	RM1,106,871.00

As at 31 May 1986 the plaintiff had owed the defendant a sum of RM1,050,100.25. This is evidenced by an audit confirmation sent by the plaintiff's auditors to the defendant.

It is obvious therefore that the defendant was clearly alarmed at the large amount of premium outstanding and especially when there was a sum due on motor premium which on the basis of cash for cover, ought to have been forthwith remitted to the defendant. On the basis of the plaintiff's failure to comply with cl. 7 of the agreement, it is my judgment that the defendant was entitled to terminate the said agreement and that the three months' required notice to be given pursuant to cl. 14, was inapplicable in respect of a breach of cl. 7. By a letter dated 13 September 1986 the plaintiff acknowledged that as of that date the current outstanding amount was RM983,959. There was no acknowledgement as to what proportion of the said outstanding amount constituted motor, and what constituted non-motor premium. In that letter the plaintiff pleaded for time to pay because the economic slowdown had caused general cash flow problems and also pleaded for the opportunity to continue with the business. This letter of 13 September 1986 by the plaintiff to the defendant was in response to the defendant's letter to the plaintiff dated 3 September 1986 and which said letter unfortunately had not been included by the defendant in the agreed bundle of documents. However the plaintiff referred to the contents of the said letter in its letter dated 13 September 1986 and pleaded with the defendant "not to adopt the actions stipulated in your letter as it entails a long legal process but to allow us some time to sort out matters one at a time in a convenient manner".

Needless to say the plaintiff was fully aware of the large sum it owed the defendant as premium due. In response to the plaintiffs letter pleading for time, the defendant by its solicitors' letter dated 25 October 1986, demanded for the outstanding premium of RM877,588.20. Unfortunately for the defendant the said notice referred to the agreement being terminated pursuant to cl. 14 of the agreement with effect from 30 September 1986. It is my judgment that the failure to transmit the collected premium within the stipulated 90 days pursuant to cl. 7 would in itself entitle the defendant to terminate the agreement forthwith. In fact, I would take the solicitors' letter dated 25 October 1986 as sufficient notice of termination as, notwithstanding the fact that the said letter had demanded for the balance due, it had also demanded for the return of "all cover notes and stationeries and/or documents" in the plaintiff's custody, control or possession within seven days from the date of the said notice failing which the defendant threatened to "advertise that those cover notes and documents as being null and void".

The defendant had withdrawn the counterclaim in this suit and the same was struck out as on 3 July 1992. The said counterclaim is now the subject matter of another claim already filed in another court. Since it is my judgment that there was no need to give notice pursuant to cl. 14 for a breach of cl. 7 in so far as this case is concerned and on the evidence so far adduced, it is my judgment that the plaintiff has failed to prove that the defendant had been in breach of the contract.

Arbitration

The plaintiff also pleaded that the defendant was in breach of cl. 21 which provided for arbitration in the event of any dispute between the parties and that the defendant had failed to resort to arbitration before terminating the agreement. A perusal of the file showed that the defendant had indeed filed an application for a stay of all further proceedings pending reference to arbitration. On 23 April 1987 the said application was dismissed with costs after the plaintiff had opposed the said application. The plaintiff is bound by issue estoppel and cannot invoke this provision in the agreement. The plaintiff's contention that it can re-agitate this issue at the full hearing since the earlier application was only an interlocutory application, is flawed as the issue of arbitration has indeed been decided, *albeit* at an interlocutory stage, yet binding upon the parties. The plaintiff has given no explanation as to why it had to oppose the said application at the interlocutory stage if its intention was to go for arbitration. Surely the plaintiff cannot approbate and reprobate.

Defamation

It is the plaintiff's case that by sending out the notice of termination of the plaintiff's agency to all customers and policy holders, and by placing such similar advertisement in The Star, Nanyang Siang Pau and Utusan Malaysia, the defendant had defamed the plaintiff. The plaintiff contended that the notice dated 10 November 1986 when read in its totality and by the natural and ordinary meaning of the words contained therein or by innuendo had defamed the plaintiff by implying that the plaintiff was in breach of the agreement, that the plaintiff was dishonest or had acted illegally by not observing regulations, for example, the cash before cover regulating motor policies, and that the plaintiff had not remitted premiums to the defendant after collecting them from the customers. The plaintiff also contended that the said notice and advertisement in the newspapers had the effect of exposing the plaintiff and its principal officers to hatred, ridicule and contempt in the mind of, a reasonable man or that such words tend to lower the plaintiff and its principal officers in the esteem of right thinking members of the public generally, and the customers, and the insurance industry. The plaintiff argued that the dispute between the plaintiff and the defendant as to the accounts between them is

quite irrelevant to the position of the customers and the insurance policies issued to them. The plaintiff pointed out that since the motor policies issued by the plaintiff as principal agent for the defendant is governed by the cash before cover regulations, the defendant ought to have known that the insinuation in the notice to the customers that the premiums had not been paid, was defamatory and malicious.

I accept the defendant's submission that since in the pleadings the plaintiff had only relied on the notice to the customers as founding a case in defamation, the plaintiff cannot now rely on the advertisements to found a case in defamation as this was not pleaded. In any case the advertisements were taken out after the plaintiff had filed the statement of claim. The advertisements were taken out on 1 October 1987 whilst the statement of claim was filed on 9 December 1986.

As for the notice, I find nothing defamatory about the contents. Since the plaintiff knew that in respect of motor policies at least the regulation requiring cash before cover must be complied with and since the plaintiff itself knew that it had collected such premiums and had not forwarded the same to the defendant, it is my judgment that the defendant was certainly within its rights to enquire from the customers proof of payment because the defendant is not expected to carry the burden of insurance without receiving the premiums. As for the non-motor policies, the plaintiff knew well that it had not complied with the 90-day rule to settle premiums. If the plaintiff felt humiliated or defamed the plaintiff was the author of its own misfortune. In any case as I said the words contained in the notice are not defamatory. In *The Capital and Counties Bank Ltd v. George Henry and Sons* [1882] 7 AC 741, H. & Sons were in the habit of receiving, in payment from their customers, cheques on various branches of a bank, which the bank cashed for the convenience of H. & Sons at a particular branch. Having had a squabble with the manager of that branch H. & Sons sent a printed circular to a large number of their customers (who knew nothing of the squabble) – "H. & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the" bank. The circular became known to other persons; there was a run on the bank and loss inflicted. The bank brought an action against H. & Sons for libel, with an innuendo that the circular imputed insolvency. In affirming the decision of the Court of Appeal the House of Lords held that in their natural meaning the words were not libellous. The inference suggested by the innuendo was not the inference which reasonable persons would draw and that the onus lay on the bank to show that the circular had a libellous tendency. The court held that the evidence, consisting of the circumstances attending the publication, failed to show it and that there was no case to go to the jury, and that the defendants were entitled to judgment.

It is important that the court does not put a strain or an unlikely construction upon the words used. The plaintiff called no witness nor led any evidence to show that the words complained of are defamatory. Applying the accepted objective test which is what the man in the street would think, upon reading the notice dated 10 November 1986 I find that the said notices were merely issued for the protection of the policy holders themselves that is to ensure that the insurance policies were still in force. There is therefore no question of any malice on the part of the defendant.

The defendant was under a legal and/or social duty to publish the said notices for the necessary protection of the general public and in particular the policy holders and also in the defendant's own interest. The defendant is a licensed insurance company. It is my judgment that the defendant was entitled by law to send out such notices.

Section 14A of the Insurance Act 1963 reads as follows:

14A. Assumption of risk by insurer and collection and refund of premium.

(1) Subject to subsections (2) and (3), no insurer shall assume any risk in respect of any general insurance business unless and until:

(a) the premium payable is received by the insurer or is guaranteed to be paid by such person in such manner and within such time as may be prescribed; or

(b) deposit of such amount as may be prescribed is made in advance in the manner prescribed.

(2) Where the premium payable pursuant to subsection (1) is received by any person, including an insurance agent or a broker, on behalf of an insurer, such receipt shall be deemed to be receipt by the insurer for the purposes of that subsection and the onus of proving that the premium payable was received by a person, including an insurance agent or a broker, who was not authorised to receive such premium shall lie on the insurer.

(3) Subsections (1) and (2) shall apply to such description of general insurance business as may from time to time be prescribed.

(4) Where any person, including an insurance agent or a broker, receives on behalf of an insurer a premium on a policy of insurance of a description for the time being prescribed pursuant to subsection (3), such person shall deposit with, or despatch by post to, the insurer the premium so collected within such period as may be prescribed in relation to policies of that description.

(5) Any refund, of premium, in relation to a policy of insurance of a description as may be prescribed under subsection (3), which may become due to an insured on account of the cancellation of the policy or alteration in its terms and conditions or for any other reason shall be paid by the insurer directly to the insured and a proper receipt shall be obtained by the insurer from the insured and such refund shall under no circumstances be paid or credited to any other person, including an insurance agent or a broker.

(6) Any person who fails to comply with this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit.

Regulation 3 of the Insurance (Assumption of Risk and Collection of Premium) Regulations 1980 reads as follows:

3. No insurer shall assume any risk in respect of any general insurance business to which these Regulations apply unless and until the premium payable is received by the insurer.

In *Ratus Mesra Sdn Bhd v. Shaikh Osman Majid* [1999] 8 CLJ 499 the defendant, a feature writer for The New Straits Times, wrote an article entitled "Ostrich farms should provide prospectus". The plaintiff had advertised its ostrich farming business in the newspapers inviting investment in ostrich farming. The plaintiff claimed that the words contained in certain paragraphs of the defendant's article in their natural meaning were understood to mean that the public or potential investors must act with caution in respect of the plaintiff's dubious advertisement. The plaintiff sued for damages for libel as well as for malicious falsehood. Dismissing the claim I held that the article was a fair comment by the defendant on a matter of public interest to safeguard the general public from rushing into such investments without sufficient details.

In *Dato' Seri Anwar lbrahim v. Dato' Seri Dr. Mahathir Mohamad* [1999] 7 CLJ 32, the plaintiff, the former Deputy Prime Minister of Malaysia, sued the present Prime Minister in defamation. The plaintiff who had been either dismissed or removed from his various governmental and political positions claimed that on 22 August 1998 the defendant falsely and maliciously spoke and published to national and international journalists of and concerning the plaintiff as well as accusing the plaintiff of homosexuality. The defendant filed an application to strike out the writ. Allowing the application to strike out and amongst other grounds, I held that as the chief executive of the government, the defendant was under a legal, moral and social duty to inform the nation of the matters concerning the plaintiff, more so when the

information that was given to the defendant as disclosed in the press conference was true in substance and in fact. The said judgment was upheld by the Court of Appeal on this ground too (see *Dato' Seri Anwar Ibrahim v. Dato' Seri Dr. Mahathir Mohamad* [2001] 1 CLJ 519). The Federal Court, whose judgment has yet to be reported, upheld the same (see *Dato' Seri Anwar Ibrahim v. Dato' Seri Dr. Mahathir Mohamad* (Mahkamah Persekutuan Malaysia Permohonan Sivil No. 08-2-2001(W)). In the circumstances, I find that the defendant herein had a legal, moral and social duty to send out the notices to all its policy holders.

Claim For Loss Of Business Goodwill

The plaintiff claimed a sum of RM2.5 million under this head. However, the plaintiff had failed to plead for this head of damage. On this ground alone this claim will not be considered. The plaintiff also led no evidence to prove this head of damage.

In any case the plaintiff submitted that "a lot of people would want to purchase a company with an annual production of RM5,836,135 and also with growing production". If the annual production was as stated, there is no reason why the plaintiff was owing the defendant a sum of RM1,106,871 as of 22 March 1986. Whilst notionally the plaintiff has been chalking up the sales of policies, it had been unable to collect the premiums. It is therefore a matter of relevance as to whether the plaintiff indeed has any goodwill because long before the defendant had terminated the plaintiff, the plaintiff was indebted to the defendant in the sum of RM1,050,100.25. I doubt if anyone would want to purchase, paying RM2.5 million as goodwill, a debt-ridden company.

Proof Of Damages

The basis for the plaintiff's claim for RM697,500 as commission is a letter written by the plaintiff to the defendant on 13 September 1986. This letter cannot constitute the basis to found the claim. Whilst the plaintiff has admitted owing the defendant a sum of RM983,959 in that said letter, the defendant had not accepted the plaintiff's total production figures for the years 1981 to 1985. As I had said earlier the plaintiff had chalked up sales with scant regard for collection. It is only when the plaintiff collects that he gets his commission. The plaintiff led no evidence to show what it had actually collected. On the other hand, it had in fact admitted owing the defendant the sum of RM983,959 as at 13 September 1986. The plaintiff has failed to discharge its burden of proof. It had not tendered any of its audited accounts. As for the projected income for the future, no evidence was led to show the prospects of achieving

such projected income. On the contrary the plaintiffs auditors confirmed that as at 31 May 1986 there was a sum of RM1,050,100.25 due and owing to the defendant by the plaintiff. DW1, the defendant's accountant, testified that as at 30.9.89, the plaintiff owed the defendant a sum of RM635,086.68 in respect of the non-motor account. The plaintiff did not cross-examine DW1 on this. In the light of the decision of the then Supreme Court in *Bank Bumiputra Malaysia Bhd Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495 I hold that the plaintiff's claim for future projected loss is too remote and untenable.

Having considered all the issues I am therefore constrained to dismiss the plaintiff's claim with costs.